rule and that case has been several times cited with approval.

Keokuk & Hamilton Bridge Co., vs. Illinois, 175 U. S., 625, 631.
Louisiana vs. Mississippi, 202 U. S., 1, 49.
Iowa vs. Illinois, 202 U. S., 59.
Washington vs. Oregon, 211 U. S., 127, 134.
Washington vs. Oregon, 214 U. S., 205, 215.

And though not cited the same principle has been declared in other cases.

Missouri vs. Nebraska, 196 U. S., 23,—
"the center line of the original channel".
Moore vs. McGuire, 205 U. S., 214,—
"the middle of the main channel."
Missouri vs. Kansas, 213 U. S., 78,—
"the middle of the main channel."

In *Missouri vs. Keane*, 84 Mo. App. 127, a well considered case, it was held:

"Where a navigable river is the boundary between two States the exact line of that boundary is the center of a navigable channel as distinguished from the center of the river from bank to bank."

We will treat the *fifth* and *sixth propositions* of law, advanced above, together,—the former relating to the gradual shifting of the boundary line as the river gradually and imperceptibly shifted and the latter re-

lating to the effect of a sudden abandonment of the river bed.

From the maps submitted to the Court—one showing the conditions in 1823, attached to the answer of defendant, and one showing the conditions in 1874, incorporated in complainant's bill,—it will be made obvious to the court that, whether accretions had or had not formed to the Arkansas shore along Dean's Island and to the Tennessee shore at the head of Island No. 37, the center of the main channel of the river had gradually shifted because of erosions from the Tennessee shore at the one place and from the Arkansas shore at the other. This shifting of the center of the main channel carried the boundary line between the two States with it. The line followed the center of the river whether it was gradually and impreceptibly shifted by additions to one bank through accretions, or the widening of the river and the consequent shifting of the main channel by erosions from the other bank. In other words, the varying center of the channel, such being gradual and impreceptible, still remained the boundary line between the States.

St. Louis vs. Rutz, 138 U. S., 226, 245.

Nebraska vs. Iowa, 143 U. S., 359.

Missouri vs. Nebraska, 196 U. S.,23.

Missouri vs. Kansas, 203 U. S., 78.

Washington vs. Oregon, 214 U. S., 205.

And the avulsion of 1876, i. e., the "Centennial Cut-Off", left the boundary line where it was just preceding the sudden abandonment of the old and the making of a new channel.

St. Louis vs Rutz, 138 U. S., 226, 245.
Nebraska vs. Iowa, 143 U. S., 359.
Missouri vs. Nebraska, 196 U. S., 23.
Missouri vs. Kansas, 213 U. S., 78.

If it be true that the effect of the Cut-Off was to leave the boundary "in the middle of the deserted river bed" (*St. Louis vs. Rutz, supra*, 245), or along "the center of the abandoned channel," (*Nebraska vs. Iowa, supra*, 367), or along "the middle of the channel of the river as it was prior to such avulsion," (*Missouri vs. Nebraska, supra*, 36), then, the boundary line between the two States was unaffected and unaltered by the avulsion and it can, without serious difficulty, be located along the middle of the main channel of the river as it ran just prior to the Cut-off.

We feel entitled to say that the proposition here submitted is not debatable and we have said so much because at this proposition the two States reach the parting of the ways.

For Arkansas, it is claimed that the avulsion had not the slightest effect on the boundary line between the two States, and that it remained where it was immedi-

ately preceding the same. For Tennessee it is claimed that the boundary line was not left where it was immediately preceding the avulsion but was pressed back to where it originally existed before it had been altered by the gradual and imperceptible shifting of the river.

And strange to say, the contention of the State of Tennessee met with favor before the Supreme Court of Tennessee in a suit between that State and a citizen of Arkansas, over some of the land affected by the location of the boundary line along or about Dean's Island, Arkansas.

State of Tenn. vs. Muncie Pulp Co., et al., 119 Tenn., 47.

Disapproving *Iowa vs. Illinois, supra*, the learned court found that "by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased,—from perhaps a little less than one mile in 1823 to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank," (see opinion, p. 114), and though announcing that "where the boundary lines between individuals, as well as States and nations, are marked by streams, and the location of the stream is altered by erosion and accretion, it continues to be the boundary line" (page 104) and after declaring that "the change made in its chan-

nel by the Mississippi River in 1876 at the 'Centennial Cut-Off' was an avulsion, and the limits of Tennessee and Arkansas—remained as they were before the formation of the new channel" (page 109), and though at page 103, avowing that "the change made by the river on March 7, 1876, in its channel, *did not alter the boundary line separating complainant* (Tennessee) *and Arkansas*, or affect the respective rights of those States," the Court concluded at pages 132, 133, with respect to the avulsion:

> "*The effect of it was to press back the line of the State*, as it ran at low water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, *and at the same time to press back to the center of the old channel*, as it ran previous to the submergence of those grants, the line between the two States, *so as to restore to Tennessee what it held before the erosions upon its banks.*"

It cannot be sound that "the change made by the river on March 7, 1876, in its channel, *did not alter the boundary line* separating complainant and Arkansas, or affect the respective rights of those States"—as announced at page 103—and it also be sound that "the effect of it was *to press back the line of the State* * * * *to the center of the old channel" as announced at pages 132 and 133.

If the avulsion "*did not alter the boundary line*," as that Court correctly declared, it did not "*press back the line of the State*," as that Court incorrectly concluded.

If the effect of the avulsion was to "press back the line of the State" and "to restore to Tennessee what it held before the erosions upon its banks," then "the change made by the river March, 1876, in its channel" *did* "alter the boundary line separating" Tenessee and Arkansas.

A line is alterated when it is pressed back nearly, if not quite, a half-mile.

And the holding that this avulsion changed the boundary line between the States—and a line cannot be pressed back nearly, if not quite, a half-mile without changing it—is not only in conflict with the principles of law announced in that very case, but with the holding by that Court, at the same term, in *Stockley vs. Cissna*, 119 Tenn., 135:

"The boundary line, therefore, between the States of Arkansas and Tennessee at the *locus in quo* of this controversy, is the middle of the old abandoned bed of the Mississippi River *as it existed at the time of the Centennial Cut-Off.*"

It is respectfully submitted that the learned Tennessee court was not consistent in its holdings and that the result reached cannot be harmonized with the principles announced.

This brings us to the *seventh proposition* of law advanced above, which relates to the recession of the water from the abandoned bed of the river, as the result of the avulsion, and to the *eighth and ninth prop-*

ositions of law, relating to the effect of the gradual encroachment of the river on the title of the riparian owner and the vesting in the State of title to land which gradually and imperceptibly becomes a part of the bed of a navigable river.

We submit, in the first place, that reliction, meaning land from which the water has receded, has no reference to land uncovered by the sudden recession of water resulting from an avulsion, but that it is similar in principle to the doctrine of accretion.

Accretion is the gradual and imperceptible addition to the riparian land and reliction is the land from which water has gradually and imperceptibly receded.

The riparian owner takes no title to land suddenly added to his shore by an avulsion, nor can an owner of land which has been lost by gradual and imperceptible submergence be restored to his right and title when his land is uncovered by an avulsion. It is not so important in this case as to the rights of the owner, but it is of great importance with respect to the territorial limits of the two States. When the boundary between the States followed the gradual and imperceptible shiftings of the river, that boundary line became fixed and permanent and to this line the territorial limits of the States extended and an avulsion could not alter that line.

The State of Tennessee, in her answer filed in this Court, is silent as to the effect on the boundary line of

the gradual and imperceptible shiftings of the river and as to the effect of an avulsion is vague and indefinite, yet her claim is thus stated:

"That where lands have been submerged by erosion, or are covered by water, as the bed of a stream, and emerge therefrom, they are restored to the former proprietors or owners to the extent of the lines of their property where the same can be identified; so that upon the happening of the avulsion in 1876 the boundary line between the States of Tennessee and Arkansas in the abandoned channel of the river is to be located midway between the banks of said river, as they existed in 1823, for the reason that the bank or shore lines, that is, the property lines, as they existed in 1823, are susceptible of definite and accurate identification, as shown by the Humphrey's map, hereinbefore made a part of this answer and exhibited thereto. These are the propositions of law—the claims—upon which respondent has ever relied for the determination of her western boundary, and which she has sought to apply and has applied in the civil action referred to by complainant in the seventh paragraph of her bill."

We cannot agree that by "the avulsion in 1876" the boundary line was placed between the banks of the river "as they existed in 1823" unless in 1823 the river occupied exactly the same banks it did in 1876,—and no one insists that this is true.

While stated with some ambiguity we understand the above declaration of Tennessee's position to be that though the boundary line shifted with the gradual changes in the course and current of the river and thus caused the acquisition of territory by the one State and a corresponding loss by the other, still as the avulsion withdrew the waters from between the banks previous-

ly occupied, the changes in the boundary line were undone and that which had been added to one state by accreation or lost to the other by erosion was, by the avulsion, taken from the one and restored to the other. That is to say, the territorial limits of a state, increased by the gradual and imperceptible action of the river, were reduced by an avulsion to the extent of this increase. And the territorial limits of a State, lost by erosions from its shore, were restored by an avulsion to the extent of the loss.

The logic of this insistence is that an avulsion does change the boundary lines between states and does not leave it where it was immediately preceding the avulsion. This, of course, leads to the conclusion that when the boundary line between States is a navigable river and the river suddenly abandons its channel and makes for itself another, the boundary line does not remain in the abandoned channel but is placed elsewhere, —and this we understand is not the law but is in conflict with all the authorities.

As the center of the river shifted by the gradual and imperceptible erosions from the Tennessee shore, the line between the two States shifted accordingly. The jurisdiction and territorial limits of the States followed the shifting of the center of the river. Land along the river bank would gradually wash away and the river would flow over that which was formerly land on and near the bank. This process of erosion con-

tinued until lands which had been in Tennessee, disintegrated and went into the river and were lost to the owner or owners and the territorial limits of said State were thus reduced. Lands which were on or near the Arkansas bank of the river disintegrated and went into the river and were lost to the owner or owners and the territorial limits of said State were thus reduced. The result was that each State lost in one place and gained in another, and, what each State lost by erosion could never be regained and restored by an avulsion.

The doctrine of the restoration to the owner of submerged land, when the waters recede therefrom, has no application to lands lost by being gradually washed away and thereafter made visible by a recession of the waters on account of an avulsion.

The river south of Dean's Island was, in 1823, less than a mile wide. By erosion from the Tennessee bank, the river moved southwardly and into the territory of said State. Suppose to Dean's Island accretions had formed (as we insist the fact to be) so that the owner of Dean's Island became the owner of the land thus added by accretion. Now, if these accretions to the Arkansas shore and the erosion into the Tennessee bank extended far enough to so project the river, that a line along what once was the Tennessee shore would be on the Arkansas shore, the title of the owner of Dean's Island to the accretions was absolute. The territorial limits of Arkansas had increased because the boundary

line followed the shifting of the river. Is it possible that though these rights were fixed, the boundary line and property rights could be affected by an avulsion, which does not affect property rights or boundary lines?

To so hold is to fail to recognize the rule that an avulsion leaves property rights and boundary lines unaffected and to announce the rule that where property rights and boundary lines are changed by the gradual and imperceptible action of the river, an avulsion thereafter occurring, results in restoring property which had been lost by erosion and alters a boundary line which had shifted with the gradual and imperceptible shiftings of the boundary stream.

The river, by its gradual shifting to the south of Dean's Island, washed away land on and along the Tennessee bank and on the Tennessee side. The boundary line between the States was alterd by this action of the river, for it followed the center of the channel. When the avulsion occurred the water receded from this channel and left the old river bed as dry land. The argument is that the land on the Tennessee side of the river thus emerged and that those who had lost their lands by erosion had them restored by an avulsion; that the line between the States, which had been gradually changed was, by the avulsion, suddenly pressed back to where it had been before the gradual changes in the river took place.

Dealing with the lands on the Tennessee side of the river which had been gradually washed away and lost by the imperceptible encroachments of the river, the Tennessee court said:

"When the waters of the river abandoned these lands, and they emerged and became dry land, the owners, in this case the State and the grantees, Huddleston and others, and not the then abutting riparian proprietors, were entitled to them. This is well-settled law."

State vs. Pulp Co., 119 Tenn., 47, 130.

If the above be sound, then the avulsion materially altered the line between the States.

The Tennessee court erroneously applied the doctrine of reliction to an avulsion.

The court quoted from *Mulry vs. Norton*, 100 N. Y., 246, as pertinent to this case and as announcing a principle of law apt here.

The land involved in that case was land upon the ocean shore at Far Rockaway. The plaintiff owned land on the sea coast, and several miles east of him was Long Beach, bounded on the east by an inlet from the ocean to the bay. The beach from opposite the island to a point west of the plaintiff's land was overflowed and washed away, and bars, shoals and islands were formed, and then, by sudden, violent and frequent changes, the inlet moved to the west of plaintiff's land and a continu-

ous bar was formed. Thereafter this inlet closed and the original one reopened, leaving a continuous beach to the west with a lagoon inside running across plaintiff's land. The court held that the plaintiff was entitled to the beach in front of his premises. The court said:

"It is undoubtedly true that the proprietorship of lands may be lost by erosions or submergence. The one consisting of a gradual eating away of the soil by the operation of currents or tides, and the other of its disappearance under water and the formation of a navigable body over it."

Mulry vs. Norton is first reported in 29 *Hun*, 660, and it appears from the report of that case that the shifting of the inlet was sudden and the beach "did not wear away by imperceptible degrees."

Mulry vs. Norton, 29 Hun., 660, 663, 665.

The Tennessee court quoted from the opinion of the New York court, and undertook to apply the rule of law there announced and which was pertinent to the facts with which that court was dealing, to an entirely different state of facts controlled by entirely different legal principles. *In the New York case the riparian owner had lost his beach by sudden and violent changes, and it had been restored to him in the same way.*

In the case at bar, Tennessee had lost her shore line by *gradual crumbling away*, and the Tennessee shore into which the river eroded was never restored, but on the contrary was carried into the river, and no human being

could identify any of that soil which had eroded from the Tennessee shore during the years when the river was increasing in width.

In *Hughes vs. Birney's Heirs*, 106 La., 664, cited and approved by the Tennessee court, the facts were that the submerged land, which was restored, was simply land which had emerged from a temporary bed of the river. The river had made a cut-off and had broken through Section 12, Township 16 North, Range 15 East, and upon making for itself this sudden channel the tendency of the river was southward, and the court said:

"It did not remain in the channel at the cut-off, where it first went through the strip of land forming De Soto Point. It seemed to be making an effort to straighten itself at that locality. Pursuing his object, it wore away all the land south of the cut-off to or near the foot of the point, and then established its permanent channel across the lower portion of the point, as shown on the sketch last above."

The land which was restored by the river having made its permanent channel was that land over which the river had passed after having made, and as a result of, the cut-off, and of this condition the court said:

"It was a case of temporary submergence. The river went over it, and in doing so carried away its surface to about the usual depth of the river at that point. But the river did not remain upon the land. It settled itself in a permanent channel south of it, and then proceeded to uncover the land it had passed over."

It is important to know that the land which was restored was that over which the river had passed *by reason of avulsion.*

In the case at bar the Tennessee shore had eroded and it had not been lost by reason or as the result of an avulsion.

The Supreme Court of Louisiana said:

"The ground upon which the river rested temporarily in going over that portion of the De Soto Point never ceased to belong to the defendants, the heirs of Birney; and the deposits placed upon it by the river in retiring from it, having been put upon land belonging to them, became likewise their property."

Harding vs. Jordan, 140 U. S., 328, is cited by the Tennessee Court to sustain the proposition that this avulsion restored the original boundary between the States of Tennessee and Arkansas, and undid the effect of the erosions from the Tennessee shore. In that case the action was to recover possession of land on Lake Michigan, and Mr. Justice Bradley stated the case as follows:

"The lake is two or three miles in extent, and the main question in the cause is whether the title of the riparian owner on such a lake extends to the center of the lake or stops at the waters' edge."

The Court stated that it must apply "the local law of the State of Illinois" in determining whether the title granted to the plaintiff's ancestor went to the water's edge or the center of the lake. The Court held, in the first place, that in Illinois, fresh water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent. We have carefully examined that case and find nothing whatever in it which

tends to support the propositioin that an avulsion can alter the effect of erosions.

The Tennessee court cited *St. Louis vs. Rutz*, 138 U. S. 226, as sustaining the proposition that a river bed from which the waters were withdrawn by an avulsion belonged, not according to the title and rights existing at the date of the avulsion, but at some previous date, the effect of which was to undo the effect of erosions and to divest rights that had become vested by reason of these erosions; and it is respectfully submitted that that case does not sustain the proposition.

Insofar as analagous to any question involved here, the facts were that the river front of surveys numbered 149 to 156 washed away; and with reference to said washing away of the land the following finding of fact is important:

"And the Court further finds, from the evidence, that such washing away of said river bank did not take place slowly and imperceptibly; but, on the contrary, the caving in and washing away of the same was rapid and perceptible in its progress."

As to the effect of this sudden washing away of land, the Court said:

"It is laid down, however, by all the authorities, that, if the bed of the stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but that, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally. The principle is recognized by the Supreme Court of Illinois in *Buttenuth vs. St. Louis Bridge Company*, 123 Ill., 535, 546, in

these words: 'The law, as stated by law writers, and in the adjudged cases, seems to be that where a river is declared to be the boundary line betwen States, although it may change imperceptibly, from natural causes, the river, as it runs, continues to be the boundary. But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed.'"

And having established, therefore, that the avulsion, which took away the land, did not affect the claimant's title, the Court said:

"When land was formed again on the place where the plaintiff's land has been washed away, it became the property of the plaintiff; and, although the land thus newly formed extended a short distance into the old bed of the river beyond the former shore line, such additional formation belonged to the plaintiff as a deposit on that part of the bed of the river which was owned by him in fee, and not to the State of Illinois or to any third party."

In other words, the opinion is entirely consistent and applies a perfectly plain principle of law to the facts as found.

In the case at bar ,the Tennessee Court reversed the situation and ultimately concluded that, though the changes had been made by erosion, they were unmade by avulsion. In other words, that Court announced just exactly the reverse of the rule of law announced in said *City of St. Louis vs. Rutz.*

The Tennessee Court cited *Stockley vs. Cissna*, 119 Fed. R. 812, 831, and it is there announced that land

lost by erosion or submersion is regained when, by reliction or accretion, the water disappears and the land emerges. This is undoubtedly true, except where the boundary betwen States is changed by erosion or accretion the change is not set at naught by an avulsion, and the principle of the sea shore cases has no application whatever.

In *Morris vs. Brooke*, 25 Alb. L. J. 90, cited by the Tennessee Court, it was said:

"The right to the new island and also to lands gained by avulsion or dereliction (in cases where they are not gained by *insensible* degrees), all of which are governed by the same principles, follows *the right to the soil which is covered with water.*"

(The italics are the Court's.)

The syllabus to *Morris vs. Brooke* is as follows:

"If a portion of the fast land of an island be washed away by the encroachments of tide water and subsequently restored by the deposit of aluvion such restored land belongs to the original owner of the fast land, as does also any increase thereof."

The inquiry then is: What, in the legal sense, is "reliction," that is, land from which the waters have receded, with respect to the method and manner of the water's recession.

Farnham on *Water and Water Rights, Vol.* 1, *page* 320, refers to accretion, avulsion and reliction, saying of the latter:

"The gradual retirement of the water from the shore by the lowering of its level. *This is known as reliction.*"

And the same author says in Vol. 3, at page 2490:

"The process of reliction is very similar to that of accretion, except that, instead of soil being added to the shore, the water gradually withdraws from it so as to leave it dry. So far as this is done by imperceptible degrees the uncovered land becomes part of the up-land and the title of the owner of the up-land extends over it."

In *Hammond vs. Shepard*, 186 *Ill.* 235, 78 *Am. St. Rep.* 274, it was said:

"Reliction is the term applied to land made by the recession of the water by which it was previously covered. Warren vs. Chambers, 25 Ark., 120, 4 Am. Rep. 23; Banks vs. Ogden, 2 Wall. 57. 'If the addition takes place suddenly and sensibly, the ownership remains according to former boundaries; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has receded.' Woolrick on Law of Waters, 29; Warren vs. Chambers, 25 Ark., 120, 4 Am. Rep., 23. All the authorities agree that in order that a shore owner take land by way of accretion or reliction it must appear that the addition was to his shore either by the deposit of earth or by the receding of the water from his land, and that such addition *must be by slow and imperceptible processes.*"

In *Cox vs. Arnold*, 129 Mo., 337, 50 Am. St. Rep. 450, it was said of land which had imperceptibly washed away:

"The only way plaintiff could have regained what land he had lost by its being washed away, and it *situs* submerged by the waters of the river, *was by gradual and imperceptible accretion*, beginning at his line at the water's edge."

In *Sapp vs. Frazier*, 51 La. Ann. 1718, 72 Am. St. Rep. 493, it was said:

"Dereliction, as used by the English law, meant when the sea shrank below the usual water mark and remained there. In those cases the law (English) is held to be that, if this be by little and little, it shall go to the owner of the land adjoining." Morgan vs. Livingston, 6 Mart. (La.) 244.

The reliction must be from the waters in their usual state."

In *Wallace vs. Driver*, 61 Ark., 429, 431, "reliction" is defined as "the gradual and imperceptible recession of the water."

In *Wilson vs. Watson*, (Ky., 1911), 138 S. W., 282, Mr. Justice Miller said:

"'Reliction' differs from 'alluvium' in this: That the former term is applied to land made by the withdrawal of the waters by which it is covered. The withdrawal of the waters must be slow, gradual and imperceptible. The same general rules apply to it as to alluvium. Murray vs. Sermon, 1 Hawks 56; Warren vs. Chambers, 25 Ark., 120, 91 Am. Dec. 538, 4 Am. Rep. 23; Boorman vs. Sunnuchs, 42 Wis. 235."

This is necessarily true because as the river gradually encroached on the Tennessee shore opposite Dean's Island (and on the Arkansas shore opposite Island No. 37), the territorial limits were extended according to and following these encroachments of the river and the sovereignty or jurisdiction of the States followed this line and private ownership ceased in the land which became the bed of the river.

In *Welles vs. Bailey*, 55 Conn. 292, 317, it is said:

"All original lines submerged by the river have ceased to exist; the river is itself a natural boundary,

and every changing condition of the river in relation to adjoining lands is treated as a natural relation and is not affected in any manner by the relations of the river and the land at any former period. . . . The river boundary is treated in all cases as a natural boundary and the rights of the parties as changing with the change of its bed."

In *Farnham on Water and Water Rights*, it is said in Vol. 1, p. 332:

"If the water gradually encroaches on the shore the title to the place where the water covers will vest in the owner of the bed of the water. The rule is absolute even though the old boundaries and the extent of the encroachment can be identified."

In *Foster vs. Wright*, *L. R. Com. Pleas Dir. Vol.* 4., p. 438, it is said, page 446:

"Gradual accretions to land from water belong to the owner of the land gradually added to, Rex vs. Yarborough, 3 B. & C. 91; and, conversely, land gradually encroached upon by water ceases to belong to the former owner, In re Hull & Selby Ry. Co., 5 M. & W. 327."

In *Wilson vs. Shirley*, 11 Ore., 215, it is said:

"When land is submerged by the gradual advance of the sea, the sovereign acquires the title to the part thereby covered by water."

In *Mulry vs. Norton*, 29 Hun. 660, it was said:

"When land is overflowed and the advance of the sea is so gradual that its progress is imperceptible, the sovereign acquires the title to the part of the shore submerged; but where the sea suddenly inundates the land, the subject retains the title to the land covered with water."

Land relicted by a sudden recession of the water belongs to the sovereign, "but if relicted gradually and imperceptibly, it belongs to the riparian proprietor."

Hodges vs. Williams, 95 N. C., 331, 59 Am. Rep. 242.

It has been our effort to establish (1) that the boundary line between Arkansas and Tennessee is the middle of the main channel, namely: the deep water or navigable channel of the Mississippi river as distinguished from a line equi-distant between the banks of said river; (2) that this line shifted with the gradual and imperceptible shiftings of this deep water or navigable channel, and (3) that the avulsion of 1876 left the boundary line in the center of the channel which was abandoned by reason, and as a result, of such avulsion.

In this effort we have combatted the propositions, (1) that the boundary line between the states, prior to the Cut-Off, was a line equi-distant between the banks of the river, whereby islands would be partly in one State and partly in another, and the channel of navigation would be wholly within one State, to the exclusion of the other; (2) that the avulsion of 1876 operated to press back the line of the respective States, at various points, to where the river formerly run, thus setting at naught the changes made in the territorial limits of the States by the gradual and imperceptible shiftings of the river, and (3) that the doctrine of reliction can not be applied to land, which, having become the bed of the river by gradual encroachments on the shore, became uncovered on account of the avulsion.

We now desire to notice certain minor matters presented by the pleadings in this case and suggested in the opinions of the Tennessee Court in *State vs. Pulp Co.*, 119 Tenn. 47 and of the Circuit Court of Appeals in *Stockly vs. Cissna*, 119 Fed. 812.

In the answer filed in this cause by the State of Tennessee the defendant "pleads and relies upon the record and judgment" in these cases "as judicial determinations and evidence of the boundary line between the States of Tennessee and Arkansas at the particular place involved in said suits."

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Neither the Tennessee Court nor the Circuit Court of Appeals, Sixth Circuit, could fix the boundary line between the two States. This court, alone, has jurisdiction of that question. And Arkansas was not a party to either proceeding.

In the early case of *Fowler vs. Lindsey*, 3 Dall., 411, an effort was made to remove to the Supreme Court a controversy between individuals over land which one party claimed was in New York and the other party claimed was in Connecticutt, "as exclusively belonging to that jurisdiction," on the ground that the States were interested in or affected by the decision.

Mr. Justice Washington said:

"It is not contended that the States are nominally the parties; nor do I think that they can be regarded as subtsantially the parties to the suits; nay, it appears to

me, that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil, they may contest it at any time in this court, notwithstanding a decision in the present suits; and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision as to the former object, between individual citizens, can never affect the right of the State as to the latter object; it is *res inter alios acta.*"

Mr. Justice Paterson said in the same case:

"The present is a controversy between individuals respecting their right or title to a particular tract of land, and cannot be extended to third parties or States. Its decision will not affect the State of Connecticutt or New York, because neither of them is before the court, nor is it possible to bring either of them, as a party, before the court in the present action. The State, as such, is not before us."

Mr. Justice Cushing said in the same case of the issue then before the court:

"A decision of that issue can only determine the controversy as between the private citizens, who are parties to the suit, and the event only give the land to the plaintiff or defendant ,but could have no controlling influence over the line of jurisdiction; with respect to which, if either State has a contest with the other, or with individuals, the State has its remedy, I suppose, under the constitution and the laws, by proper application, but not in this way; for she is not a party to the suits."

A judgment binds only parties and their privies.

Stone vs. Towne, 91 U. S., 341.

Livingston Co. vs. Darlington, 101 U. S. 407.

County of Morgan vs. Allen, 103 U. S. 498.

United States vs. Lee, 106 U. S. 196.

New Orleans vs. Bank, 167 U. S. 371.

Mitchell vs. Bank, 180 U. S. 471.

Nor. Pac. R. Co., vs. Slaght, 205 U. S. 122.

And does not bind strangers to the action.

Lorejoy vs. Murray, 3 Wall 1.

Mut. Ben. Ins. Co., vs. Tisdale, 91 U. S., 238, 244.

Humes vs. Scruggs, 94 U. S. 22.

Minn. Ass'n vs. Canfield, 121 U. S., 295.

Whitney vs. U. S., 167 U. S., 529.

Dull vs. Blackman, 169 U. S., 243.

Even had an officer of the State of Arkansas been a party to both of said suits the State would be unaffected thereby.

Peck vs. State, 137 N. Y., 372.

As to *State vs. Pulp Co.*, 119 Tenn., 47, we have to say that that case involved the claim of the State of Tennessee to certain real estate and the right of the State to the property depended on the location of the boundary line between Tennessee and Arkansas. The Supreme Court of that State recognized this, as is shown by the following statement, page 70:

"This is an important question, affecting the States of Tennessee and Arkansas in their sovereign capacity, and their jurisdiction along this entire boundary line."

Surely the State of Arkansas was not affected by the judgment of the Tennessee court in a case to which it was not a party, wherein it did not appear and wherein it was not heard. The Tennessee court had no sort or semblance of authority or power to fix the boundary line between the States of Arkansas and Tennessee. Arkansas, however, submits that the Tennessee court was wrong in declining to follow *Iowa vs. Illinois, supra*, but was right in holding that the avulsion of 1876 "did not alter the boundary line" between the two States, (page 103 of opinion) and was wrong in not adhering to this announcement and in later holding that the effect of the avulsion "was to press back the line of the State" of Tennessee to where it was many years before the avulsion.

As to *Stockley vs. Cissna*, 119 Fed. 812, we have to say that that was an action of ejectment between individuals. The plaintiff Stockley claimed the land in controversy as accretion to land claimed by him in Tennessee. The defendant pleaded in abatement that the land was in Tennessee, and that the court was without jurisdiction. On the whole proof it appeared to the defendant that the plaintiff had failed to make out his case, so the plea to the jurisdiction of the court was withdrawn and the familiar rule invoked that, in an ejectment suit, a plaintiff must fail if he fails to establish title to the land in controversy. This position does not concede title to be elsewhere than in the defendant

but proceeds on the idea that as the title is not shown to be in the plaintiff, he must fail. In ejectment, a plaintiff must recover on the strength of his own title.

Swayze vs. Burke, 12 Pet. 11.
Christy vs. Scott, 14 How. 282, 292.
Fussell vs. Gregg, 113 U. S., 550.
Doolan vs. Carr, 125 U. S., 618, 629.
McCormick vs. Hayes, 159 U. S., 332.
Lockhart vs. Johnson, 181 U. S., 516, 529.
Filhiol vs. Torney, 194 U. S., 356.
Dubar vs. Green, 198 U. S., 166.
McGuire vs. Blount, 199 U. S. 142.

Nothing was involved in that case but the plaintiff's title, though the opinion of the court took quite a wide range. That we are correct about what was really involved, is shown by the court's statement on a petition to rehear:

"If the plaintiff failed to show such a legal title as would support an action of ejectment, it was the duty of the court to instruct for the defendant; for it was a matter of no concern to the plaintiff whether the *locus in quo* was the property of the heirs of John Trigg, Mrs. Martha P. Smith, or of the defendant. If the plaintiff had failed to show title in himself, his case broke down, and that was an end of it."

We call the court's attention to the statement of the Supreme Court of Tennessee that the boundary line between the two States "has been settled by the duly

constituted authorities of Tennessee and Arkansas by judicial decision, legislation and other authorized official actions, long acquiesence, the exercise of jurisdiction unchallenged, and other acts amounting to an agreement or convention."

State vs. Pulp Co., 119 Tenn. 95.

We have to say that there has never been any "authorized official actions, long acquiesence, the exercise of jurisdiction unchallenged," etc. No such claim is made in this court, as we read the answer. Certainly no "official actions" are designated and nothing that savors of an agreement or convention is suggested in the opinion of the Tennessee court or in the answer of the defendant in this court. No compact or agreement was ever entered into between the States, and even had one been made the consent of Congress was required to give it validity.

Virginia vs. West Virginia, 11 Wall, 39.
Florida vs. Georgia, 17 How. 478.

In the last cited case it was said:

"And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void without the assent of Congress."

In 1903 there was an effort to have a commission appointed by each State to settle this boundary line dis-

pute and the legislatures of both States passed acts looking to this end. The governor of Arkansas vetoed the act passed by the Arkansas legislature and the matter ended. The act passed by the Tennessee legislature is important only as showing the legislative claim by Tennessee.

In the preamble to that act it is said:

"Whereas, the western boundary of the State of Tennessee, prior to the year 1876, was the center of the main channel of the Mississippi river. And the true boundary between Tennessee and Arkansas is still the center of the channel of the Mississippi as it then flowed, but by a sudden and very remarkable change in the channel in 1876 a part of Tennessee was thrown to the western side of the river, and today nearly an entire civil district is on the western or Arkansas side of the Mississippi. Prior and up to 1876 the channel of the Mississippi river at a point some thirty or forty miles above the city of Memphis, in Tipton county, made a bend embracing some fifteen or twenty miles in the circuit, and returned to a point some two miles from where the circuit began. This bend was known as the "Devil's Elbow," and the center of this channel is the recognized line between Tennessee and Arkansas. A peninsula was thus formed, separated from Arkansas by the Mississippi river and connected with the main land on the Tennesse side by a narrow strip or neck.

In 1876 the Mississippi river by a sudden avulsion or change of its channel, cut across this neck at what is called "Centennial Cut-off", and abandoned its former channel around "Devil's Elbow", thus throwing a large body of land, a part of the territory of Tennessee, west of the Mississippi. In a few years after this change was made the water entirely disappeared from the old and abandoned channel, so that what was formerly the center of the Mississippi river and the boundary between Tennessee and Arkansas, is now dry land, a large part of which has grown up in willows and cottonwood trees.

Under well known principles of law, recognized by the highest authorities, this avulsion or sudden change in the channel of the Mississippi river, did not operate to change the boundary line between Tennessee and Arkansas. That boundary is still the center of the old and abandoned channel of the Mississippi river, but that line has never been marked and located since the channel was abandoned and became dry land."

Ch. 420, *Acts of* 1903.

The admission or statement is made in the above that the boundary line is "the center of the old and abandoned channel of the Mississippi river", and of course, the channel which was abandoned was the channel of 1876. So that the only "legislation" on this subject is legislative recognition by Tennessee that the line should be run as Arkansas here contends, but we do not deem this binding or of importance.

On January 21, 1909, Congress authorized Tennessee and Arkansas to make the necessary "agreement or compact . . . to fix the boundary line between said States where the Mississippi river now or formerly formed the said boundary line", (S. R. 118), but nothing was done under this authority, so conferred.

The "judicial decisions" to which the Tennessee court referred, in the excerpt above, was *Cessill vs. State*, 40 Ark., 501. If the decision in that case is to be treated as fixing the boundary line between the States or as "solemn admissions", as the Tennessee court con-

sidered it, (page 96), the only effect would be to run the line between the banks of the river of 1876 rather than along the center of the main or navigable channel of the river.

The facts of that case are that Cessill, in 1883, was indicted for illegally selling whiskey from a boat in the Mississippi river. He claimed that the boat was on the Tennessee side of the river, and after an elaborate discussion of boundaries it was said:

"It should have been left with the jury to determine whether the position of the boat was nearer the Arkansas or the Tennessee main bank, and to have found the defendant guilty or innocent accordingly."

We do not regard that case as affecting the actual boundary line between the States as this court must determine for itself, and in the exercise of its own judgment, whether the line is to be run between the well-defined banks or along the center of the deep water channel of the river.

We believe that we have touched upon the various questions that will arise on the hearing of the pending motion and invoke the judgment of the court with respect to the boundaray line between the States of Arkansas and Tennessee.

WILLIAM L. MOOSE,
Attorney General of State of Arkansas.
HAL L. NORWOOD,
CARUTHERS EWING,
Solicitors for Complainant.

FILE COPY.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

In the Supreme Court of the United States

STATE OF ARKANSAS, Plaintiff,

v. Original, No. 6

STATE OF TENNESSEE, Defendant.

NOTICE OF MOTION FOR ORDER AS TO PROOF AND HEARING.

CARUTHERS EWING,
Counsel.

S. C. TOOF & CO., PRINTERS, MEMPHIS

In the Supreme Court of the United States

STATE OF ARKANSAS, Plaintiff,
v. Original, No.....
STATE OF TENNESSEE, Defendant.

NOTICE OF MOTION FOR ORDER AS TO PROOF AND HEARING.

The defendant is hereby notified that on April 2nd, 1917, on the convening of the Supreme Court of the United States in the City of Washington, application will be made to the Court on said date, or as soon thereafter as plaintiff may be heard, for an order (1) fixing the time within which the defendant shall take its proof, and (2) designating a time for the submission of this cause after the taking of said proof.

The basis and grounds of said application are set forth in a petition to be then and there presented to the Court, copy of which is herewith furnished you.

This 27th day of February, 1917.

.....

Counsel for Plaintiff.

Copy of above, together with copy of petition mentioned therein, received this March 1st, 1917.

.....

Counsel for Defendant.

In the Supreme Court of the United States

STATE OF ARKANSAS, Plaintiff,

v. Original, No.....

STATE OF TENNESSEE, Defendant.

PETITION FOR ORDER AS TO PROOF AND HEARING.

To the Honorable, the Supreme Court of the United States:

Your petitioner, the State of Arkansas, respectfully shows to the Court that, on February 21, 1911, it filed its original bill in this Court against the State of Tennessee to have determined and settled the boundary line between the plaintiff and defendant within that territory which was affected by an avulsion on March 7th, 1876 whereby the Mississippi River abandoned its old and made a new channel, the avulsion being commonly called the "Centennial Cut-off."

To this bill the State of Tennessee filed a demur-

rer on January 9, 1912, which was seasonably heard and the demurrer overruled.

An answer was filed by the defendant, State of Tennessee, in April, 1913, whereupon and thereafter plaintiff, the State of Arkansas, moved the Court to determine the principles which should control the location of the boundary line and to appoint a Commission for that purpose. This motion, being argued, was by this Honorable Court overruled and the application denied on March 4th, 1914.

There is pending in this Court, in error to the Supreme Court of the State of Tennessee, the case of *W. A. Cissna, plaintiff in error, v. State of Tennessee, defendant in error,* which involves practically the same questions as are involved in the instant case. The record in said suit (*W. A. Cissna, plaintiff in error, v. State of Tennessee, defendant in error*), was filed March 20th, 1915, and is quite voluminous, containing approximately 950 pages.

Unavailing efforts have been made to agree that all or essential parts of the evidence in the case of *Cissna v. Tennessee* might be used, or to agree on the facts necessary to enable the Court to settle the legal questions involved, to the end that a Commission might be appointed and run the line as directed by this Court.

These efforts failing, it was then agreed that fur-

ther proceedings should be held in abeyance until a hearing in this Honorable Court of the case of *W. A. Cissna v. State of Tennessee, supra,* as it was believed that in that case the principles which would necessarily control the running of the line would be determined.

This Honorable Court, on December 11th, 1916, reserved a decision on the merits in the case of *Cissna v. Tennessee* for reasons given in the opinion handed down on that date, and said:

> "For these reasons we direct that this case be restored to the docket and that it be hereafter assigned for the hearing at the same time and immediately after the coming on for hearing of the original boundary suit between the two States. And to the end that that hearing may be expedited, we say in addition, first, that if the facts in the boundary case be stipulated by the parties, either by reference to the facts shown in this case or otherwise, both the cases will be taken on submission on printed briefs, if the parties are so advised; or second, if they are not so advised, upon an agreement and stipulation as to the facts in the boundary case, that case and this will be ordered advanced and assigned for oral argument at an early day."

Prior to the date said opinion was handed down, and because of the suggestion of the Court made during oral argument, counsel for the State of Ark-

ansas, on November 17th, 1916, submitted to counsel for the State of Tennesse a stipulation as to facts which it was believed embraced every matter with respect to which there was no controversy, and all that was deemed necessary to the determination of this cause, because it is to be assumed that this Court cannot, from any evidence, run a boundary line, but must appoint a Commission for that purpose, giving the Commission such directions as the situation developed by proof may demand in view of the law applicable to the facts exhibited either by proof or stipulation.

The State of Tennessee, acting strictly within its rights, deemed it proper to decline to make any stipulation, despite the fact that it was suggested that any erroneous statement in the stipulation could be eliminated or any matter omitted could be inserted.

Failing in an effort to have the matter presented to this Court on facts stipulated by the parties, the State of Arkansas thereafter and on February 2nd, 1917, took its proof, and on said date notified the State of Tennessee that proof on behalf of the plaintiff had been concluded.

Said proof was at once filed in this Court.

In view of the foregoing, the State of Arkansas deems it proper to make application to this Court

for an order (1) requiring the State of Tennessee, within a time to be fixed by this Court, to take its proof, and (2) for directions with respect to the submission of the case within a designated time after the taking of said proof.

Petitioner represents to the Court that the matters in controversy, which must necessarily afford a basis for the settlement of those principles to control the running of the line, are within a most narrow compass; they relate only to matters which fall but little short of matters of which the Court takes judicial knowledge, and yet, by reason of certain statements and claims in the answer of the State of Tennessee to petitioner's bill, petitioner did not deem it expedient that the case be set for hearing on bill and answer.

To the end that the matter may be brought to a speedy determination, the petitioner agrees, (and it may be made part of any order made by this Honorable Court with respect to the taking of proof by defendant), that only three days' notice shall be given petitioner of the taking of such proof.

Respectfully submitted,

STATE OF ARKANSAS,

By Brothers Evans

Counsel.

STATE OF TENNESSEE,
COUNTY OF SHELBY.

Caruthers Ewing makes oath in due form of law and says that he is personally acquainted with the facts that are set out in the above petition, and that they are true to the best of his knowledge and belief.

.....

Sworn to and subscribed before me, this 27th day of February, 1917.

.....

Notary Public.

FREE COPY.

FILED
AUG 7 191
JAMES D. MAH

No. 12 Orgl.

IN THE

Supreme Court of the United States

October Term, 1917

THE STATE OF ARKANSAS,

vs.

THE STATE OF TENNESSEE.

BRIEF AND ARGUMENT FOR THE STATE OF ARKANSAS

JOHN D. ARBUCKLE,
Attorney General of Arkansas
and
CARUTHERS EWING,
Solicitors for Plaintiff

E. C. TOOF & CO., PRINTERS, MEMPHIS

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SUPREME COURT OF THE UNITED STATES

October Term, 1917.

THE STATE OF ARKANSAS,

vs. No. 4, Original.

THE STATE OF TENNESSEE.

BRIEF AND ARGUMENT FOR THE STATE OF ARKANSAS.

This cause, wherein is involved the location of the boundary line between Arkansas and Tennessee, is to be determined on stipulated facts. The line in question relates to that territory affected by an avulsion which occurred on March 7th, 1876.

Rec. 39.

There are two definite propositions with respect to which the parties are sharply at variance:

1. Arkansas contends that the avulsion did not alter the boundary line but that it "remained the middle of the river bed which was, by the avulsion, abandoned," (Rec. 42), "whereas the State of Tennessee contends that the line was affected by the avulsion." The particular effect of the avulsion, as Tennessee insists, was to press back

the line from the middle of the abandoned river channel to a point where, in 1823, the river had run.

Rec. 42.

2. Without regard to the effect of the avlusion, Arkansas contends that the "middle of the Mississippi river," (being the boundary line), means the middle of the channel of navigation,—the middle of the river at low water stage, whereas, Tennessee contends "that the true boundary line between the said states is a line equidistant between the well defined banks at a normal stage of the said river."

Rec. 41.

North Carolina ceded to the United States, on February 25th, 1790, certain territory, describing the western boundary of the ceded territory as "the middle of the Mississippi river."

Vol. 1. *American State Papers, Public Land,* p. 17.

Tennessee was admitted into the Union on June 1st, 1796, and its territory embraced that which was embraced in the above deed of cession by North Carolina.

1 *U. S. Stat. at Large, p.* 491.

In the Tennessee Constitution of 1796, (sec. 32, art. 11), the western boundary of that State was not set out other than the territorial limits were defined "as described in the act of cession of North Carolina to the United States of America."

By section 80 of *Shannon's Code of Tennessee* it is provided that "the western boundary of the State of Tennessee is *the middle of the stream* of the Mississippi river."

In 1903, in the preamble to an act providing for a Commission to act with a Commission to be appointed by the Governor of Arkansas to survey and locate the line at the point or place involved in this proceeding the western boundary of the state was described by the Tennessee Legislature as "the *center of the main channel* of the Mississippi river."

Ch. 420, *Acts of* 1903.

In 1907, a similar act was passed and the recital therein was that "the western boundary of the State of Tennessee prior to the year 1876 was the *center of the middle thread* of the main channel of the Mississippi River and the true boundary between Tennessee and Arkansas is still *the center of the main channel* of said river as it then flowed."

Ch. 516, *Acts of* 1907.

The western boundary of Tennessee therefore has been often dscribed and stated:

"The middle of the Mississippi river" (North Carolina's deed of cession); "the middle of the stream of the Mississippi river," (Tennessee Legislature, 1903), and "the center of the middle thread of the main channel of the Mississippi River," (Tennessee Legislature, 1907).

Arkansas was admitted into the Union on June 23rd,

1836 and the eastern boundary was described as the "middle of the main channel of the Mississippi River."

5 *U. S. Stat. at Large,* 50-51.

The above is the exact language used in Article 1 of the Arkansas Constitution of 1836.

Middle of Channel of Navigation Is True Line.

Whether the avulsion did or did not affect the boundary line, i. e. whether it is to be located where the river run at the time of the avulsion or where the river run at some other time, it is important that the Court settle whether the boundary line is the middle of the channel of navigation, the deep water channel, or whether it is a line equidistant between well defined banks at a normal stage of water.

This is a matter of importance because of the peculiar topographic condition at the *locus in quo* and means considerable territory.

The parties stipulated:

> "That along the Mississippi River and notably along the river as it ran prior to 1876 around 'Island 37' and 'Devil's Elbow,' as described in the reported cases *supra*;[1] the bank on one side would, at places, be a high and caving bank, depending on the erosive effect of the water against said bank, and on the opposite side or across from such bank would be a flat

[1] *Stockley vs. Cissna,* 119 Fed. 812; *State vs. Pulp Co.,* 119 Tenn. 47; *Stockley vs. Cissna,* 119 Tenn. 135.

> or sloping shore; that the width of the river would be thus materially affected by the rise and fall of the river; that at low-water stage the river would be of much less width than at any other stage; that at a normal stage of the water the river would be considerably wider than at low-water stage."
>
> Rec. 41.

This court knows that the Mississippi River is sinuous, winding, and, on one side, in many places, will be found a sloping bank contigious to which the water is very shallow and on the opposite side of the river will be a high bank with the water deep and navigable.

If the contention of the State of Tennessee is maintained, then at the point in controversy the navigable or steamboat channel of the river was wholly within the territory limits of Tennessee or Arkansas dependent upon the nature of the bank at the particular point.

Frequently along the Mississippi River (as above stipulated) there will be on one side a very high bank and on the other a sloping bank, so that, except at low water stage, the stream is not confined within a bed which gives any certainty as to the real channel of the river. A bank-full stage on one side of the river may run many miles on the other side and it is part of the history of this country that a bank-full stage at Memphis, without any overflow on the Tennessee side, would send the waters of the Mississippi twenty-five miles across the lower and sloping lands of Arkansas. That is, this situation yearly

arose before the inauguration of the levee system. In dealing with small rivers which have well-defined banks, no trouble can arise in ascertaining what would be the center of the river. There could never be a variation of more than a few feet.

It was said in *Handley's Lessee* v. *Anthony,* 5 Wheat. 375:

> "Wherever the river is a boundary between the States, it is the main, the permanent river, which constitutes that boundary; *and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark.*"

In the case of *Lamb* v. *Rickets,* 11 Ohio 311, it was held that "*the center of the river*" was ascertained by "computing the quantity of land *between low-water mark and the center of the river,*" and this upon the theory that in Ohio a riparian owner had title to "the water's edge at low-water mark."

The Supreme Court of Wisconsin held in *Franzini* v. *Layland,* 120 Wis. 72, 97 N. W. 499:

> "1. The boundary line between this State and the State of Minnesota, where the Mississippi River divides them, is the center line of the main channel of said river.
>
> 2. The main channel of the Mississippi River means the principal navigable channel, the one customarily followed in steamboat navigation.
>
> 3. Said boundary line may be very near the Wis-

consin shore at some points and very near the Minnesota shore at others, according to the location of the main navigable and navigated channel. It is a changing line, subject to property rights, as the pathway of navigation changes, according to the purpose designated in locating it at the center of the main channel, that being to preserve for all time, within the boundary of this State, one-half of the navigable pathway of the river, wherever located."

In the case of *Iowa* v. *Illinois,* 147 U. S. 1, it was said:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separate is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line."

The Court reviewed *Dunleith & D. Bridge Co.* v. *Dubuque,* 55 Ia. 558, and *Buttenuth* v. *St. Louis Bridge Co.,* 123 Ill. 535, (in the former case the Court held that the line was equidistant between banks and in the second case the Court held that it was the middle of the navigable channel), and said:

"The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We, therefore, hold, in accordance with this view, that the

line which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the 'mid-channel,' and if there be several channels, to the middle of the principal one, or rather, the one usually followed."

The Supreme Court of Tennessee reached a conclusion in a case before that Court involving this particular avulsion at war with the contention of the State of Arkansas (*State* v. *Pulp Co.*, 119 Tenn., 47). In that case the defendants made before that Court the same contention here made by the State of Arkansas and thereof the learned Court said at page 84:

"The only cases that have been called to our attention supporting the contention of the defendants are those of *Buttenuth* v. *St. Louis Bridge Co.*, 123 Ill., 535, 17 N. E. 439, 5 Am. St. Rep., 545, and *Iowa* v. *Illinois*, 147 U. S. 1, 13 Sup. Ct., 239, 37 L. Ed. 55, both involving the line in the Mississippi river separating the State of Iowa and Illinois. The former was decided first, and is cited and approved in the latter."

The Tennessee Court quoted extensively from the opinion of Mr. Justice Fields in *Iowa* v. *Illinois, supra,* and said of that case:

"This case is in direct conflict with the previous cases of *Missouri* v. *Kentucky, St. Louis* v. *Rutz, Jones* v. *Souland, St. Louis Public School* v. *Risley and Nebraska* v. *Iowa,* above cited, which involved practically the same question, and the first four con-

strued the same treaties and acts of congress. They are not differentiated, overruled, or even referred to in the case of *Iowa* v. *Illinois*. The decision in these cases is based upon the proper construction of the treaties and acts of Congress admitting the States into the union, and not upon the laws of nations. We are better satisfied with the reasoning of these cases than we are with that of the last one, and prefer to follow them."

We believe the Tennessee Court erred in concluding that *Iowa* v. *Illinois* was in conflict with the five cases mentioned.

Jones v. *Soulard*, 24 How. 41, the earliest of the cited cases, decided in 1860, involved the question whether a grant of land, bounded by a fresh water river, where the expressions designating the water line are general, conferred proprietorship "to the middle thread of the stream." The calls for boundary in the charter of St. Louis were "to the Mississippi; from thence by the Mississippi," and the argument was that these calls limited the boundary to the banks of the channel, rather than carried same "to the middle thread of the Mississippi River." The Court declined to sustain this insistence.

The Schools vs. Risley, 10 Wall., 91, the next of the cases, decided in 1869, involved the question whether a street or tow path, for the public use, existed between a certain parcel of land and the river, when St. Louis was founded and laid out, as determining whether the owner

of said lot was a riparian owner. It was essentially a question of fact.

Missouri v. *Kentucky*, 11 Wall. 395. (decided in 1870), was a suit to ascertain and establish the line between the two States at a point on the Mississippi River, known as Wolf Island. The location of the main channel of the river, whether east of the island when the boundary between the States was fixed, was the subject of investigation. We can find nothing in the case repugnant to the principles annouced in *Iowa* vs. *Illinois*.

St. Louis v. *Rutz*, 138 U. S., 226, involved the question whether the land in dispute was "a part of surveys 149 to 156 inclusive, in the common field of Prairie du Pont, with the accretion thereto" or whether it was an accretion to, and part of, an island called "Arsenal" or "Quarantine Island." The Court, declining to review findings of fact, decided (1) that whether the title of a riparian proprietor went "to the middle thread of the stream or only to the waters' edge" was governed by the law of the State, (2) that if the bed of a stream changed imperceptibly, etc., the line of the land bordering on it changed with it, (3) that if the change was by reason of a freshet and occurs suddenly, the line remained as it was originally, and (4) that the middle of the main channel of the Mississippi River was the line between Illinois and Missouri.

Nebraska v. Iowa, 143 U. S. 359, announced the well settled rule that when a boundary stream changes and

shifts gradually and imperceptibly the line follows such changes, but when the stream suddenly abandons its bed and seeks a new course, the line remains in the abandoned channel; and that these principles applied to the Missouri river.

So that, as we interpret them, no one of the cases said by the Supreme Court of Tennessee to be in conflict with *Iowa* v. *Illinois* is repugnant thereto.

And the rule announced in *Iowa* v. *Illinois* has been repeatedly declared by this Court to be the correct rule and that case has been several times cited with approval.

Keokuk & Hamilton Bridge Co. v. *Illinois,* 175 U. S. 625, 631.

Louisville v. *Mississippi,* 202 U. S. 1, 49.

Iowa v. *Illinois,* 202 U. S. 59.

Washington v. *Oregon,* 211 U. S. 127, 134.

Washington v. *Oregon,* 214 U. S. 205, 215.

And though *Iowa* v. *Illinois* was not cited the same principle has been declared in other cases.

Missouri v. *Nebraska,* 196 U. S. 23, "the center line of the original channel."

Moore v. McGuire, 205 U. S. 214, "the middle of *the main channel.*"

Missouri v. *Kansas,* 213 U. S. 78, "the middle of the main channel."

In *Missouri* v. *Keane,* 84 Mo. App. 127, a well-considered case, it was held:

"Where a navigable river is the boundary between two States the exact line of that boundary is

the center of a navigable channel as distinguished from the center of the river from bank to bank."

In *Western Union Tel. Co. v. L. & N. R. R. Co.*, 270 Ill. 399, Ann. Cas. 1917B, 670, it was said "that when the middle of a navigable river becomes the boundary line between two States, *the middle of the current or channel of commerce* will be regarded as the boundary line. (*Keokuk, etc., Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482; *Iowa v. Illinois*, 147 U. S., 13 S. Ct. 239, 37 U. S. (L. ed., 55). The phrases "middle of the river" and "middle of the main channel" are equivalent expressions and both mean the main line of the channel, or, as it is frequently expressed, the middle of the thread of the current."

In addition to the cases which we have cited to sustain the proposition that the boundary line is the center of the navigable channel as distinguished from the center of the river from bank to bank, we might direct the Court's attention to the following:

St. Joseph & G. I. R. R. Co. v. *Devereux*, 41 Fed. 14.
Morgan v. *Reading*, 3 Smedes & M. 366.
Myers v. *Perry*, 1 La. Ann. 372.
Flynn v. *Boston*, 153 Mass. 372.
Whiteside v. *Norton*, 205 Fed. 5.
McBride v. *Steinweden*, 72 Kan. 508.
Cooley v. *Golden*, 52 Mo. App. 229.

This question is important because at low water stage the river would be about one-half mile wide and the line

would therefore be about one-quarter of a mile from the high bank. At a normal stage of water the river at the *locus in quo* might be about a mile and a half wide. (Rec. 40.) The line would therefore be about three-fourths of a mile from the high or bluff bank. The difference amounts to a strip of land many miles in length and a quarter of a mile wide, *i. e.*, about 4,000 acres.

Effect of the Avulsion.

The next and possibly the most important question is as to the effect of the avulsion of 1876.

The Supreme Court of Tennessee had this identical question before it in *State* v. *Pulp Co.*, 119 Tenn., 47, and in *Stockley* v. *Cissna*, 119 Tenn., 135.

In both of the above cases the question arose with respect to this particular cut-off.

The latter case was a forcible entry and detainer suit between private individuals. In that case the Court quoted with approval from *Missouri* v. *Nebraska*, 196 U. S. 33:

> "Avulsion is the sudden and rapid change in the course or channel of the boundary river. It does not work any change in the boundary, which remains as it was—in the center of the old channel, although no water may flow therein."

In the former case it was said at page 104 of the reported opinion:

> "Where the boundary lines between individuals as well as states and nations are marked by streams, and the location of the stream is altered by erosion and accretion, it continues to be the boundary line; but where an alteration occurs as the result of an avulsion, no change is made, but the limits of the private estates or national territory and jurisdiction remain as before."

After an elaborate review of the authorities, the Court said (at page 109) that it had "in the light of these authorities no hesitancy in holding" that no rights were affected by the avulsion, but that "all remained as they were before the formation of the new channel." At pages 132-133 of the reported opinion, however, it was said of the avulsion:

> "The effect of it was to press back the line of the State, as it ran at low-water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two states, so as to restore to Tennessee what it held before the erosion upon its banks."

It is impossible to reconcile the statement that "no change is made" by an avulsion (p. 104) and that all rights "remained as they were" before the avulsion (p.

109) with the statement that the effect of the avulsion "was to press back the line of the State" and to restore to Tennessee "what it held before the erosion upon its banks" (pp. 132-133).

Before passing from the somewhat curious views entertained by the learned Tennessee Court we might say that the authorities are not in conflict on the proposition that when the avulsion took place the boundary line between the two States remained the center of the abandoned channel. In fact, the Supreme Court of Tennessee, in *Stockley* v. *Cissna, supra,* so said at page 162:

> "The boundary line, therefore, between the States of Arkansas and Tennessee at the *locus in quo* of this controversy, *is the middle of the old abandoned bed* of the Mississippi river *as it existed at the time of the Centennial Cut-off.*"

And such was the declaration of the Legislature of the State of Tennessee in the enactments heretofore noted, to-wit, *Chap.* 420, *Acts of* 1903, and *Chap.* 516, *Acts of* 1907.

And such was the view of the learned Attorney General of the State of Tennessee when he instituted the suit of *State* v. *Pulp Company, supra.* (*See* pages 133-134 of the published opinion of the Court).

We confidently assert that the contention that the avulsion altered or affected in any way the boundary line between Arkansas and Tennessee is destitute of supporting authority.

Innumerable cases might be cited to the proposition, but the following are deemed amply sufficient:

Philadelphia Co. v. *Stimson*, 223 U. S. 605, 624.
Missouri v. *Kansas*, 213 U. S. 68.
Washington v. *Oregon*, 214 U. S. 205.
Missouri v. *Nebraska*, 196 U. S. 23.
Whiteside v. *Norton*, 205 Fed. 5.
Rees v. *McDaniel*, 115 Mo., 145.
Rober v. *Michelsen*, 42 Neb. 48; 116 N. W. R. 949.
Fowler v. *Wood*, 73 Kan. 511; 6 L. R. A. (N. S.) 162.
Niehaus v.*Shepherd*, 26 Ohio St. 40.
Coulthard v. *McIntosh*, 143 Ia. 389; 122 N. W. R. 233.
Nix v. *Pfeifer*, 73 Ark. 199; 83 S. W. R. 951.
Wallace v. *Driver*, 61 Ark. 429; 31 L. R. A. 317.
State v. *Bowen*, 149 Wis. 203; 39 L. R. A. (N. S.) 200.
Stone v. *Royar*, 200 Mo. 444; 98 S. W. 601.
McBride v. *Steinweden*, 72 Kan. 508.
Kinkead v. *Turgeon*, 74 Neb. 573.

It is recognized by all authorities that boundary lines are unaffected by an avulsion. The river's sudden abandonment of its bed left the line between the two states exactly as it existed at the time of this sudden and visible abandonment. Otherwise, an avulsion does affect and alter the boundary line.

Reliction Inapplicable to Avulsion.

In 1821 there was a survey of the western territory, and based on this survey, J. H. Humphreys, a surveyor, un-

dertook to make a map which showed the location of the river as of 1823, the year the plats based on the survey of 1821 were recorded.

It is agreed that (about Dean's Island) the land and river lines of 1823 were substantially as set out on that map (Rec. 40). That map appears opposite page 28 of the record in the case at bar.

It is agreed that from 1823 to 1876 material alterations were made in the location of the river *"by erosion and caving in of the Tennessee bank."*

So that the general situation as it existed just before the cut-off is agreed to be as reflected on the Suter map (Rec. 40). The Suter map appears opposite page 4 of the record and therefrom will be seen the changes that had occurred after the original survey of 1821. On this Suter map are red lines indicating conditions as delineated by the Humphreys survey.

The changes in land and river lines were made by the erosive effect of the waters on the Tennessee shore opposite and about Dean's Island, and also by the erosive effect of the waters on the Arkansas shore immediately opposite Island No. 37.

But is is unimportant what State lost by the erosive effect of the waters on its shore. What each State lost by erosion or gained by accretion is a matter of no concern. The boundary line between the states followed the

gradual and imperceptible shiftings of the river. What each State lost or gained by gradual and imperceptible shiftings of the river was a permanent loss or gain except and unless these changes were undone as they were made, to-wit, gradually and imperceptibly.

Gradual and imperceptible changes in property rights and in boundary lines are unaffected by the fact that as the result of an avulsion land which had been lost by erosion is uncovered. The doctrine of reliction only applies when land is uncovered gradually and imperceptibly; it never applies when the recession of the waters from the land is sudden and visible.

Jones v. *Johnson,* 18 How. 150, 156.
St. Louis v. *Rutz,* 138 U. S. 226.
Warren v. *Chambers,* 25 Ark. 120; 91 Am. Dec. 538.
Fowler v. *Wood,* 73 Kan. 511; 85 Pac. 763; 6 L. R. A. (N. S.) 162.
Collins v. *State,* 3 Tex. App. 323.
Bouvier v. *Strickett,* 40 Neb. 793.
Peuker v. *Canter,* 62 Kan. 363.
Hammond v. *Shepard,* 186 Ill. 235.
Vogelsmeier v. *Prendergast,* 137 Mo. 271.
Wallace v. *Driver,* 61 Ark. 429; 31 L. R. A. 317.
Noyes v. *Collins,* 92 Ia. 566; 26 L. R. A. 609.
Cox v. *Arnold,* 129 Mo. 337, 341.
Sapp v. *Frazier,* 51 La. Ann. 1718.
Perkins v. *Adams,* 132 Mo. 131.
Naylor v. *Cox,* 114 Mo. 232, 243.
Boorman v. *Sunnuchs,* 42 Wis. 233, 245.
Nix v. *Dickerson,* 81 Miss. 632.
Bellefontaine Imp. Co. v. *Niedringhaus,* 181 Ill. 426.

Carr v. *Moore,* 119 Ia. 152; 93 N. W. 52.
Wilson v. *Watson,* 141 Ky. 324; 138 S. W. 283.
Farnham on Waters and Water Rights, Vol. 1, p. 320; Vol. 2, p. 2490.

The case of *Mulry* v. *Norton,* 100 N. Y. 246, is about the only support to be found for the proposition that the doctrine of reliction can be invoked when the land is uncovered by an avulsion. The statement in the Court's opinion to this effect is mere *dictum.*

This case was considered by the New York Court in *Matter of City of Buffalo,* 206 N. Y. 319, and comment was made on "the breadth of the discussion and the limited scope of the decision." It was said, however, of *Mulry* v. *Norton* that the plaintiff in that case had not lost his title to lands "which had been temporarily affected by the sudden and violent action of the sea."

In other words, land submerged "by the sudden and violent action of the sea" is land that is lost by an avulsion and the owner still has title thereto. He simply cannot use the land because it is covered with water. Land thus covered by water belongs to the owner and wholly on the principle that an avulsion does not affect property rights and titles.

We will not review the cases which we have above cited further than to call attention to the language of a few of the Courts:

In *Sapp* v. *Frazier,* 51 La. Ann. 1718, 72 Am. St. Rep. 493, it was said:

> "Dereliction, as used by the English law, meant when the sea shrank below the usual water mark and remained there. In those cases the law (English) is held to be that, if this be by little and little, it shall go to the owner of the land adjoining. *Morgan* v *Livingston,* 6 Mart. (La.), 244 * * * *
>
> *The reliction must be from the waters in their usual state."*

In *Collins* v. *State,* 3 Tex. App. 323, it was said:

> *"If the course of a river is suddenly changed, the relicted soil remains according to the former bounds."*

In *Bouvier* v. *Stricklett,* 40 Neb. 793, the facts were almost identical with the case at bar. The Nebraska side was the caving bank. A "cut-off" took place. After reviewing the authorities as to the change made by the caving in or crumbling away of the Nebraska bank, the Court said:

> "By the first of these changes in the course of the Missouri river, the then owner of the land suffered a loss from what may be termed a natural decretion of the land, and the riparian owner on the Iowa side gained the accretion or formation of land caused by the recession of the river and its deposits of soil contiguous to his land."

And as to the avulsion the Court said:

> "By the change, which is termed an 'avulsion,' the

boundary did not change, but still remained the old, or DeSoto channel, and ownership of land remained in the party owning it at the time of the avulsion, and the owner of the land on the Nebraska side, to which it was apparently added or made contiguous, acquired no right or claim to it."

The Court correctly applied the principles announced:

"Applying these rules of law to the facts developed in the case at bar, we conclude that the channel formed for the river by its first and gradual change, of course, became the boundary line of the plaintiff's land, and that by the second and sudden change the boundary was not changed or affected."

In *Noyes* v. *Collins,* 92 Ia. 566, 26 L. R. A. 609, it was said:

"The rule is, in order to entitle the adjoining property holders to the right of possession of land left by receding water, that *the recession must be gradual, slow and imperceptible.* In case of a sudden and sensible recession of the water, the ownership of the land will not be changed. *Warren* v. *Chambers,* 25 Ark. 120, 91 Am. Dec. 538; *Murry* v. *Sermon,* 8 N. C. 56; *Boorman* v. *Sunnuchs,* 42 Wis. 233; *Gill* v. *Lydick* (Neb.), 59 N. W. Rep. 104."

In *Wilson* v. *Watson,* 141 Ky. 324, 138 S. W. 283, the Kentucky Court said of "reliction:"

"The withdrawal of the waters must be slow, gradual and imperceptible."

To hold that the doctrine of reliction could be applied to land uncovered as the result of an avulsion would be to hold that boundary lines and property rights are affected by an avulsion, whereas the law is well settled to the contrary.

It is deemed necessary to notice only one other matter:

The State of Tennessee contends that it is now impossible to locate accurately the line of the river of 1876, whereas the State of Arkansas insists that there is no real difficulty in locating that line (Rec. 42), but what each State contends about a difficulty in locating a line can have no possible bearing on the result of this lawsuit.

If it be true that the middle of the river of 1876, that is, the middle of the abandoned bed, is the true boundary line between Arkansas and Tennessee, then the Commission will be directed to so locate the line.

The Court will readily conclude, we believe, that no sort of difficulty could exist with respect to finding the middle of an abandoned river bed, especially when the river which abandoned its bed was the Mississippi. At any rate, it is agreed that the middle of the river of 1823 was not the middle of the river of 1876, and therefore not the true boundary line. It is so stipulated, in so far as the fact is concerned, in the case at bar.

(Rec. 40.)

If the Commission reports its inability to conform to the directions of the Court, then and only then will this Court deal with that situation.

Respectfully submitted,

JOHN D. ARBUCKLE,,
Attorney-General of Arkansas;

Carruthers Ewing

Solicitors for the Plaintiff.

FILE COPY.

JAMES D. MAH

In the Supreme Court of the United States

OCTOBER TERM, 1917

THE STATE OF ARKANSAS,

vs.

THE STATE OF TENNESSEE.

No. 2 Original.

REPLY BRIEF FOR STATE OF ARKANSAS.

JOHN B. ARBUCKLE,
Attorney General,
and
CARUTHERS EWING,
Solicitors for Arkansas.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

THE STATE OF ARKANSAS

vs. No. 4 Original.

THE STATE OF TENNESSEE.

REPLY BRIEF FOR STATE OF ARKANSAS.

A careful analysis of the brief and argument for the State of Tennessee shows that the learned counsel for the defendant is somewhat confused as to the various propositions involved.

I.

It is said, at page 3, that "Tennessee contends that the true boundary line is, and should continue to be, a line drawn along **the abandoned bed of the river** at a point equidistant between its well defined and principal banks at a normal stage of water."

At page 25 it is, in effect, said that Tennessee does not contend that the true boundary line is within "the **abandoned bed** of the river," "but at a point equidistant between the principal and well defined banks of the **former stream,**" and at page 28 it is said "that as a result of the avulsion the abandoned bed of the

river went dry, and that on the happening of this event, the old lines, as they existed in the earliest record we have thereof, to-wit, 1823, were re-established."

In the nature of a sub-title, at page 28, it is said and italicized:

> **"Effect of avulsion was to leave boundary in abandoned bed of stream."**

Whereas, at page 7, as a sub-title, there appears in italics:

> **"Since the avulsion of 1876 caused the old river bed to dry up, old lines should be re-established, and this by applying the doctrine of submergence and reappearance of land."**

In view of the stipulation as to facts, that is, that the bed of the river of 1823 was not the bed of the river of 1876, and that the only river bed which was abandoned as the result of the avulsion was that of 1876, it is quite difficult to reconcile the statements and insistences of counsel.

And, again, it is obvious that if, as counsel frequently assert, the boundary line is to be found within "the abandoned bed of the river," it cannot be that, because of or by the avulsion, "old lines" as they existed in 1823 "were re-established." It cannot be true that the boundary line is to be found in "the abandoned bed of the river" and it also be

true that it must be found elsewhere through the medium of a "re-establishment" of a pre-existing line.

The learned counsel for Tennessee, in their argument, do not overlook the stipulation that the river of 1876 was not within the same bed as the river of 1823, for at page 30 they say:

> "It must be borne in mind that between 1823 and 1876 the river had moved southwardly and westwardly for a considerable distance into Tennessee territory, through erosion and caving in of the banks on the Tennessee shore," etc.

And, while frequently conceding and asserting that the effect of an avulsion is to leave the boundary in the abandoned bed of the stream, and making that statement the heading of a discussion commencing at page 28, it is yet said that the effect of the avulsion "was to press back the boundary line to where it was in 1823, the date of the oldest record of the line since Tennessee was admitted to the Union" (page 3), and this statement is repeated at page 28.

It is said, at page 29:

> "We concede, and entirely agree with learned adversaries, that the effect of the avulsion in 1876 was not to carry the boundary line between Arkansas and Tennessee into the new channel in Centennial Cut-Off, across the heel of

> the Horseshoe, referred to in our statement of facts, but that the boundary remained and still is in the abandoned bed of the old channel around the bend."

The above is all that the State of Arkansas has ever claimed, that is, that the line "is in the abandoned bed of the old channel around the bend."

It is contended, at times, by the learned counsel for the State of Tennesse that the effect of the avulsion was to press back the line between the States to a point which was not in the bed abandoned by the river of 1876, and at other times it is conceded that the boundary line is to be found in this abandoned river bed.

If the boundary line is to be found in the abandoned river bed, it is, of course, unnecessary to discuss whether an avulsion entitled either State to a "re-establishment" of previously existing lines. The boundary line was left by the avulsion in the abandoned river bed or it was pressed back to some other point or the avulsion brought about a situation which calls for some sort of "re-establishment" of the line.

II.

The proposition is advanced that **"the rule of the thalweg should not be applied after a stream aban-**

dons its bed in which a boundary line is to be established" (page 5).

The only reason given why the "rule of the thalweg" (so-called) should not be applied to the given case is said to be the absence of "the preservation of rights of equality in navigation and fishery." (Page 5).

If where water flows in a navigable river the boundary line between two States is at a certain place, then it must continue at that place after an avulsion or the boundary line is altered by the avulsion. So that it is obvious that "the rule of the thalweg" must be applied if, as counsel at times seemingly concede, an avulsion does not alter a boundary line between States.

In other words, the territorial limits of each State are said to extend to a certain point within a navigable river, but the argument is that should the waters of the river be diverted by avulsion there is a change wrought in the territorial limits of the two States.

Under a separate heading, advancing this proposition ("The rule of the thalweg should not be applied after a stream abandons its bed in which a boundary is to be established," page 10), counsel cite an opinion by the Hon. Caleb Cushing, Attorney General (8 **Opinions of Attorney Generals**, 177, 178), and the

reason that eminent lawyer gave why an avulsion did not affect a boundary line completely answers the insistence here made by the State of Tennessee. The learned Attorney General said that "just as a stone pillar constitutes a boundary, not because it is stone, but because of the place in which it stands, so a river is made the limit of nations, **not because it is running water** bearing a certain geographical name, but because it is water flowing in a given channel and within given banks which are the real international boundary." (Page 13.)

If that which is called "the rule of the thalweg" is a sound rule, then it should be applied despite the avulsion, for the line runs along the middle of the navigable channel, not because it is **running water**, but because that line is the real international boundary.

Counsel here again run counter to the universally recognized rule that the avulsion of 1876 had no effect on the boundary line between the two States.

III.

The suggestion is made by Tennessee's learned counsel that the line, to-wit, a point equidistant between well defined banks, rather than the middle of the navigable stream, is a matter which has been "established by interpretation, acquiescence and prescription." The argument made in this behalf has

no relation to whether the line is to be run in the abandoned bed of the river of 1876 or an old line "re-established" by a pressing back process, but we respectfully submit that there has been no interpretation of any treaty by any authority, nor has there been any acquiescence in any line, nor any prescriptive rights acquired to any territory in so far as relates to whether the line should be run between well defined banks or along the middle of the river at low water mark.

An examination of the authorities cited to this proposition by Tennessee's learned counsel will show an utter absence of any basis for a claim of a prescriptive right in the one State or the other.

IV.

In order to bring it about that the avulsion altered the boundary line between the two States, Tennessee must invoke the doctrine of reliction. It is insisted at page 29 that "the doctrine of submergence and reappearance of land applies, and **old boundaries are re-established.**"

No case cited to this point sustains the insistence that the effect of an avulsion is to alter property lines and property rights by applying a doctrine which relates only to property lines and property rights when land is uncovered gradually and imperceptibly.

A most casual examination of the cases on which Tennessee relies will disclose that there is no foundation for an abandonment of the rule that property and boundary lines and rights are not altered by an avulsion, even though it is generally recognized that when one owns submerged soil from which the water gradually recedes he will still have that land if it can be identified.

In this connection it is said that the facts in this case are "peculiar," and further:

> "The state of facts in the case at bar is unusual and permits of the readjustment of boundary lines so as to restore to each grantee in Arkansas and Tennessee his lands affected by the changes from time to time in the course of the Mississippi River during a period of approximately forty years." (Page 43).

It may well be said that the sudden abandonment of a river bed "is unusual," but this is to be always said of any avulsion, that is, any sudden abandonment by a river of its bed. No peculiar and particular reason exists in the case at bar for making an avulsion the basis "of readjustment of boundary lines" and the setting at naught of changes made "from time to time in the course of the Mississippi river" prior to the avulsion.

We submit these observations to the Court because from the inception of this controversy there has been,

as we view it, a misconception of the law and a confusion with respect to exactly the propositions Tennessee asserts to be the basis of her claims.

We are as much bewildered by the brief of the very able and learned attorneys for the State of Tennessee as by the opinion of the Supreme Court of the State of Tennessee **(State vs. Muncie Pulp Co.)** which was evidently the source and inspiration of their argument.

Respectfully submitted,

JOHN B. ARBUCKLE,
Attorney General,
and
CARUTHERS EWING,
Solicitors for Arkansas.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 2 Original

THE STATE OF ARKANSAS, Complainant,

vs.

THE STATE OF TENNESSEE, Defendant.

MOTION OF STATE OF ARKANSAS TO CONFIRM REPORT OF COMMISSION AND TO TAX COSTS

CARUTHERS EWING,
Solicitor for Complainant.

TOOF-MEMPHIS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 2 Original

THE STATE OF ARKANSAS, Complainant,

vs.

THE STATE OF TENNESSEE, Defendant.

MOTION OF STATE OF ARKANSAS TO CONFIRM REPORT OF COMMISSION AND TO TAX COSTS

Now comes the State of Arkansas and moves that the Report of the Commission, filed herein on May 24, 1921, be confirmed; and that the exceptions filed to said report by the State of Tennessee be overruled.

And the State of Arkansas, by its counsel, further moves the Court with respect to the taxation

of costs, that the expense of printing the Report of the Commission be paid by the State of Tennessee, because:

1. The State of Tennessee was alone dissatisfied with the report and, as a condition to excepting thereto, required the State of Arkansas to pay the cost of printing same, to-wit, $3,150.

2. The exceptions filed by the State of Tennessee to the report were frivolous and presented no real question for the consideration of the court, and, outside of the costs incident to printing the report, that Tennessee might file frivolous exceptions thereto, the State of Arkansas submits that the report of the Commission should be confirmed and all expenses incident to this proceeding should then, as aforesaid, be directed to be in equal proportions paid by the parties hereto.

Respectfully submitted,

CARUTHERS EWING,
Solicitor for State of Arkansas.

NOTICE TO COUNSEL

Please take notice that on the 3rd day of March, 1924, or as soon thereafter on the convening of court as counsel can be heard, the complainant will move the court:

1. To confirm the report of the Commission filed herein on the 24th day of May, 1921, and to decree the boundary line in accordance with the report of the said Commission.

2. To tax the defendant with the cost of printing the report to which the defendant filed frivolous exceptions, and

3. To tax all other costs incident to this proceeding as to the court may seem right and proper.

Dated, January....., 1924.

CARUTHERS EWING,
Solicitor for Complainant.

J. S. UTLEY,
Attorney-General of Arkansas.

EWING, KING & KING,
Of Counsel.

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WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 2 Original

THE STATE OF ARKANSAS, Complainant,

vs.

THE STATE OF TENNESSEE, Defendant.

BRIEF AND ARGUMENT FOR THE STATE OF ARKANSAS ON EXCEPTIONS OF THE STATE OF TENNESSEE TO THE REPORT OF COMMISSIONERS APPOINTED TO RUN THE BOUNDARY LINE BETWEEN ARKANSAS AND TENNESSEE.

CARUTHERS EWING,
Solicitor for State of Arkansas

J. S. UTLEY,
Attorney-General of State of Arkansas.

EWING, KING & KING,
Of Counsel.

COOP.-MEMPHIS

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